Supreme Court, U.S.
FILED

(1) 981499 MAR 17 1999

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No. _____

IN THE

Supreme Court of the United States

October Term, 1999

LEE LONGTIN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW.

When a trial court is advised that defense counsel is "handicapped" by a clear conflict of interest, is automatic reversal required where the trial court entirely ignores the conflict and does not conduct any inquiry or hearing?

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JURISDICTIONAL STATEMENT.

The date of the judgment of the highest court of New York State sought to be reviewed is December 17, 1998. The date of entry is the same.

This Court has jurisdiction to review the judgment in question by Writ of Certiorari pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION.

This case involves interpretation of the Sixth Amendment to the United States Constitution:

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE.

Introduction

On December 17, 1998, the New York Court of Appeals acted as if it were based in Washington, D.C. instead of Albany, New York. In deciding the present case on that date, the court recognized that criminal defense counsel had a conflict of interest concerning police misconduct in fabricating evidence and the trial court erred in failing to conduct the required hearing. But the court declined to follow this Court's principle that reversal is automatic whenever a trial court fails to hold a hearing about a possible conflict of interest. Instead, the court held that counsel's unexplored conflict of interest does not require *per se* reversal and thereby disagreed with two decades of federal court precedent interpreting this Court's decision in *Holloway v. Arkansas*, 435 U.S. 475 (1978). That disagreement on an issue so fundamental as the right of a criminal defendant to counsel demands this Court's attention.

Facts

When attorney Benjamin Darden undertook the representation of Lee Longtin, he had no idea that a conflict of interest was lurking around the corner. Indeed, when jury selection for Longtin's trial began on November 2, 1992 before Tompkins County Judge William C. Barrett, Darden still did not suspect that he might not be able to devote his undivided loyalty to Longtin's cause. But much would change over the next few days.

Counsel's Conflict of Interest

On November 5, 1992, in the midst of jury selection and after Longtin's motions *in limine* had been submitted, news reports and media inquiries cast an ominous shadow over the prosecution's case. *See* Trial Transcript at 117-46. An emerging pattern of improprieties by the state police unit that processed evidence in this case was at the center of the reports and inquiries. *Id.* at 118-120. The investigation focused on Investigator Robert Lishansky and Investigator David Harding, colleagues in the same state police unit. *Id.* at 139.

Lishansky had gathered evidence against Longtin in this case. *Id.* at 120. Even though Lishansky was on the prosecution's witness list, *id.*, the district attorney had not told Darden of the investigation into Lishansky. Yet, the prosecutor conceded that there may be "something wrong with [the fingerprint evidence] in this case," *id.* at 120, and that "this may be a case where his fingerprint report was false." *Id.* at 137. In fact, the prosecutor admitted that the "police [told him] that it may have been done in this case because [of] the shape of the prints."[1] *Id.* at 138. Because the evidence against Longtin was almost exclusively state police evidence, the news of the corruption of an officer involved in this very case was a defense windfall. Indeed, it presented the opportunity for a new avenue of defense.

But defense counsel did not—and could not—go down that road because of his duty to another client. More specifically, Darden represented David Harding, a

[1] On April 15, 1993, Lishansky removed all doubt when he pleaded guilty to falsifying evidence against Longtin in violation of Penal Law §210.40. *People v. Lishansky*, Indictment #93-037S, (Tompkins Co., April 15, 1993); *Muniz v. Roth*, 163 Misc.2d 293, 620 N.Y.S.2d 700 (Tompkins Co. 1994).

target of the same investigation that focused on Lishansky. *Id.* at 144. Because of what he knew about Harding's misconduct, Darden realized that he could not zealously represent Longtin while at the same time honoring Harding's attorney-client confidences. *Id.* at 135, 142.

Confronted with this classic conflict of interest, counsel adopted the textbook approach: he sought "guidance from the Court." *Id.* at 119. He advised the trial judge that "Mr. Harding had pled out" and that "Investigator Lishansky had been suspended." *Id.* at 118.

He explained that

> I was asked by David Harding to represent him. I interviewed Mr. Harding on four occasions. *I have a lot of information,* of course, that I have obtained which, of course, is *protected by the attorney/client privilege. So I am handicapped in how far I can go with this.* So I have to rely upon whatever we were told here.

Id. at 135. (emphasis added).

Counsel's message was unmistakable. He had information—in his words, "a lot of information"—that might be used on Longtin's behalf. *Id.* But he was "handicapped" by virtue of his dual representation. *Id.* In simple terms, counsel told the court that his ability to use that information on behalf of Longtin was compromised because it had been obtained confidentially from another client. *Id.* at 135.

The trial judge did nothing to resolve that conflict, however. He did not conduct a hearing. He did not ask Darden about the particulars of the privileged information obtained from Harding. He did not give counsel some time to try to resolve the conflict. He never

even asked the defendant whether he understood the nature of the conflict and whether he wished to proceed with Darden as his counsel. *Id.* at 118-21, 134-46. Rather, the trial court simply went ahead with the trial, requiring Darden to continue as defense counsel notwithstanding his ethical constraints. *Id.* at 145.

The Trial

"[H]andicapped" because of his conflict of interest *id.* at 135, Longtin's counsel failed to exploit the misconduct issue at trial. After only five days of testimony, and after calling only two witnesses, the defense rested. *Id.* at 866. Defense counsel could have called Lishansky as a witness, and even stated that he intended to do so. *Id.* at 857. But he never did. *Id.* at 866. Nor did he effectively convey to the jury the significance of the reported misconduct by the state police.

The jury found Longtin guilty on nine counts. He was later sentenced to a term of imprisonment of 17 years to life. Longtin filed a timely notice of appeal, and an appeal to the New York Appellate Division, Third Department followed. By a Memorandum and Order dated December 18, 1997, the Third Department affirmed Longtin's conviction. On March 9, 1998, the New York Court of Appeals granted Longtin leave to appeal, but on December 17, 1998, it affirmed the conviction. The Court found that the trial court had erred in not holding a hearing on the conflict issue but that a defendant must prove more than the existence of a potential conflict of interest, in order to secure a reversal. The Court imposed the additional burden of proving the " 'conduct of the defense was in fact affected by the operation of the conflict of interest' " or that the conflict " 'operated on' counsel's representation."

Because the New York Court of Appeals has emasculated the defendant's Sixth Amendment right to conflict-free counsel and has ignored the automatic reversal rule that attaches to cases under the precedents of this Court as interpreted by the federal courts across the nation, Longtin seeks certiorari from this Court.

REASONS FOR GRANTING THE WRIT.

The Trial Court's Failure To Conduct An Inquiry Regarding Trial Counsel's Admitted Conflict Of Interest Requires *Per Se* Reversal.

A. The Rule Established By This Court And Two Decades of Interpretation By The Federal Courts Is That Failure To Conduct A Conflict Of Interest Hearing Requires Reversal *Per Se*; The New York Court of Appeals Ruled To The Contrary.

The Sixth Amendment guarantees criminal defendants the right to effective assistance of counsel, including the right to representation free from conflicts of interest. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wood v. Georgia*, 450 U.S. 261 (1981); *Cuyler v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978). Indeed, this Court has held that where the trial court fails to make a record inquiry with respect to defense counsel's conflict of interest, reversal is mandatory. But in New York, the *per se* reversal principle is not followed. This case thus presents an opportunity for this Court to bring New York in line on the fundamental issue of a criminal defendant's Sixth Amendment right to conflict-free counsel.

The seminal case in this regard—and the one with the most similarities to the case at bar—is *Holloway v. Arkansas*, 435 U.S. 475 (1978). In *Holloway*, as in the present case, defense counsel informed the trial court that he was prevented from using certain information at trial because he had learned that information through his simultaneous representation of other clients—in that case co-defendants. The trial court ignored the conflict, conducting no inquiry. This Court decided that the Sixth Amendment requires "*automatic*" reversal under such circumstances. *Holloway v. Arkansas, supra*, 435 U.S. at

487-91 (emphasis added); *see also Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); *Glasser v. United States*, 315 U.S. 60 (1942). Thus, if the trial court fails to conduct an inquiry after a timely conflict objection or if the court "knows or reasonably should know a particular conflict exists," reversal is required. *Cuyler*, 446 U.S. at 347.

Based upon *Cuyler* and *Holloway*, the federal courts have adopted an automatic reversal rule whenever a trial court fails to fulfill its duty to inquire. *See, e.g., United States v. Levy*, 25 F.3d 146, 153-54 (2d Cir. 1994) ("When a possible conflict has been entirely ignored, reversal is automatic.") (citing *Cuyler v. Sullivan, supra* and *Holloway v. Arkansas, supra*); *accord Hamilton v. Ford*, 969 F.2d 1006, 1011 (11th Cir. 1992) (reversal automatic when there is no inquiry because "the trial court has failed to discharge the constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel"), *cert. denied*, 507 U.S. 1000 (1993); *United States v. Burney*, 756 F.2d 787, 791 (10th Cir. 1985) ("the Sixth Amendment requires automatic reversal only when a trial court fails to conduct an inquiry after either a timely conflict objection . . . or if the court knows or reasonably should know a particular conflict exists") (quotations and citations omitted); *see also Ciak v. United States*, 59 F.3d 296 (2d Cir. 1995) (automatic reversal rule applies to collateral proceedings as well as to direct appeals). Thus, at least in federal court, reversal is mandated without any further showing from the appellant whenever the trial court fails to inquire.

But in New York, that principle is not followed. In New York, before a defendant's conviction will be reversed for the failure to conduct a conflict of interest inquiry, the defendant must show not only that defense counsel had a conflict of interest and not only that the

trial court failed to hold the required hearing, but also that the conflict was substantially related to the defense. *See, e.g., The People of the State of New York v. Longtin*, 92 N.Y.2d 640, _____ N.Y.S.2d _____ (1998). The additional requirement for reversal in New York not only flies in the face of this Court's prior precedent and its progeny, it also gives short shrift to a defendant's fundamental right to conflict free counsel.

B. The Facts Of This Case Illustrate The Constitutional Flaws In The New York Rule.

Despite receiving notice that Longtin's counsel had such a conflict here, the trial court conducted no inquiry whatsoever. Indeed, despite being told by defense counsel that counsel was "handicapped" because he had information that he could not use on his client's behalf in light of his duty to another client, the court did nothing at all. The New York State Court of Appeals acknowledged defense counsel's conflict and even conceded that "defendant argues persuasively that the trial court should have conducted a hearing . . . ." If Longtin had been tried in federal court, that would have ended the inquiry on this constitutional question. Because he was tried in a New York State court, however, the court gave him another hurdle to clear and ultimately affirmed his conviction.

The facts of this case illustrate the soundness of the *per se* reversal rule. Indeed, the trial court's decision to ignore the conflict demonstrates why *per se* reversal is warranted. First, by its very nature an attorney's conflict of interest deprives the client of a fundamental right guaranteed by the Sixth Amendment—the right to a legal representative with single minded allegiance to the client's cause. Depriving a defendant of such an advocate can never be harmless. That is the ultimate

message of the *per se* reversal rule, a message that fell on deaf ears here. Moreover, by its very nature, an attorney's conflict of interest prevents the attorney from doing something—adopting some strategy—that he might otherwise elect to do. Here for example, the conflict prevented counsel from exploiting the police misconduct that he learned about from his client. An investigation of that misconduct would have uncovered what was later found to be a wide-ranging pattern of evidence fabrication by the agency responsible for the investigation of Longtin. Such information at the disposal of conflict-free counsel might have given Longtin his best chance to convince a jury that a reasonable doubt existed. But pursuit of the defense required defense counsel to do what was ethically prohibited: use information obtained confidentially from another client.

Second, the New York requirement that a defendant show a "substantial relationship" between his trial attorney's conflict of interest and his defense is illogical and unworkable. If there is no hearing into the nature of counsel's conflict and its impact on the defendant's case, how can a defendant possibly prove a substantial relationship? Asked another way, if defense counsel never reveals the confidential information that causes his conflict of interest, how is the defendant to know enough about the conflict to show a "substantial relationship" between the conflict and his defense?

Suppose, for example, that defense counsel here had been told by his former client Harding that Harding had actually seen his law enforcement partners plant evidence in numerous drug prosecutions like this one. Indeed, that might have been exactly what created the conflict here, but remains locked in defense counsel's mind because of the court's failure to conduct any

inquiry. If that is the case, then as soon as defense counsel learned that Lishansky—one of Harding's co-workers who gathered evidence in this very case—was a target of the corruption investigation, then he surely had information that he could have used in Longtin's defense were it not for the conflict.

Of course, the defendant was unable to make such a showing in the New York State Court of Appeals—or to convince the court that his prior attorney's conflict of interest bore a substantial relationship to his defense—precisely *because* the trial court conducted no inquiry whatsoever. The record is silent about the nature of the conflict and its practical impact on the defense precisely *because* no inquiry was conducted. A *per se* reversal rule is required here precisely *because* the silence of the record cannot indicate whether the conflict was harmless or crucial, real or imagined.

Seen in light of the facts in this case, the New York "substantial relationship" requirement not only is illogical, but it also emasculates the precedent of this Court as interpreted by the Circuit Courts of Appeals and the Sixth Amendment right to conflict-free counsel. The *per se* reversal rule better follows logic and precedent, better protects precious Sixth Amendment rights, and better ensures that a criminal defendant will have a truly fair trial.

In the briefs below, defendant urged the New York Court of Appeals to reconsider its requirement that a conflict of interest bear a substantial relationship to the defense before reversal is required. In light of the well-established precedent of this Court, especially as interpreted by numerous federal court decisions, defendant argued that the New York Court of Appeals should adopt an automatic reversal rule whenever the

trial court fails to inquire about a potential conflict brought to its attention. But the Court of Appeals refused to do so, thus highlighting the conflict between New York and the federal courts and trampling the defendant's Sixth Amendment rights in the process. This Court should grant certiorari to resolve the conflict between the New York State courts and the federal courts with respect to a crucial issue of interpretation of the United States Constitution.

CONCLUSION.

It is respectfully requested that this Court grant the petition for a writ of certiorari in this matter.

DATED: Buffalo, New York
March 17, 1999

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Opinion of the New York State Court of Appeals, Dated December 17, 1998.

[1] STATE OF NEW YORK

COURT OF APPEALS

3 No. 193

THE PEOPLE & C.,

Respondent,

v.

LEE LONGTIN,

Appellant.

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Terrence M. Connors, for appellant.
George M. Dentes, for respondent.

OPINION

KAYE, CHIEF JUDGE:

Defendant on this appeal urges that his conviction should be overturned because a potential conflict of interest prevented his attorney from providing effective assistance of counsel, and because the prosecution failed to timely disclose certain *Brady* material. Concluding that neither claim provides a basis for reversal, we affirm the Appellate Division order upholding the conviction.

In August 1991, a police informant made two controlled buys of cocaine from defendant at his home in the Town of Dryden. [2] The following month, police obtained an eavesdropping warrant authorizing a wiretap

on defendant's telephone, which allowed them to intercept a conversation in which defendant arranged for the purchase of 250 grams of cocaine for $7,000 from Richard Muniz. The following morning, police observed Richard Lucas and Daryl Hallock leave defendant's home in his car. That afternoon, Lucas and Hallock were seen in New York City with Muniz, and at approximately 10:00 p.m. were seen arriving back at defendant's residence. After executing a no-knock search warrant at defendant's residence, police found four packages of cocaine, two electronic scales, assorted plastic bags, a bottle of Inositol (a cutting agent) and approximately three pounds of marihuana.

Defendant was indicted, along with Muniz, Hallock and Lucas, for two counts of conspiracy in the second degree. Defendant was also charged individually with various counts of criminal possession of a controlled substance, criminal possession of marihuana, criminal sale of a controlled substance and criminally using drug paraphernalia.

On November 5, 1992, during voir dire, defense counsel informed the court and the prosecution that he had just learned that State Police Investigator Robert Lishansky, who was on the People's witness list, had been suspended for alleged evidence tampering. Lishansky had found fingerprints of defendant and co-defendant Hallock on the packaging material containing the drugs seized from defendant's home. The prosecutor responded that, while he had no "firm information" that Lishansky falsified the [3] prints in defendant's case, he would not call him as a witness or introduce the fingerprint evidence at trial.

Defense counsel also informed the court and the prosecutor that he had just been told that David Harding, a State Police Investigator who served in the

same unit as Lishansky, had pled guilty to charges of evidence tampering. Counsel stated:

> "I was asked by David Harding to represent him. I interviewed Mr. Harding on four occasions. I have a lot of information, of course, that I have obtained which, of course, is protected by the attorney/client privilege. So I am handicapped in how far I can go with this."

Counsel then moved for a mistrial on the ground that *Brady* material was not timely produced. Noting that Lishansky was suspended on October 23 and plea negotiations with Harding took place prior to defendant's trial, counsel argued that it was inconceivable that someone in the Tompkins County District Attorney's office would not have known about Lishansky earlier. At the latest, defense counsel argued, the material should have been turned over on October 23. The prosecutor responded that a special prosecutor's investigation of Harding had been extended to include Lishansky and possible evidence tampering in an unrelated case. The prosecutor maintained that he had just learned of the possibility of Lishansky's evidence tampering in defendant's case.

County Court denied defendant's motion for dismissal or a mistrial on the basis of a *Brady* violation. Defendant was convicted, after a jury trial, of conspiracy in the second [4] degree, two counts of criminal possession of a controlled substance in the first degree, criminal possession of marihuana in the second degree, three counts of criminally using drug paraphernalia in the second degree, and two counts of criminal sale of a controlled substance in the third degree. The Appellate Division affirmed defendant's conviction, as do we.

The New York State and Federal Constitutions guarantee the right to effective assistance of counsel, meaning representation that is reasonably competent, conflict-free and singlemindedly devoted to the client's best interests (*People v. Ortiz*, 76 NY2d 652, 656). A lawyer who represents two clients with conflicting interests by definition cannot give either client undivided loyalty (*id.; see also, People v. McDonald*, 68 NY2d 1, 9; *People v. Mattison*, 67 NY2d 462, 468, *cert denied* 479 US 984). Nor are conflicting interests limited to the simultaneous representation of clients. Because an attorney has continuing professional responsibilities to former clients, including a duty to maintain that client's confidences and secrets even after representation has ceased, potential conflicts may exist between former clients and current clients (*People v. Ortiz*, 76 NY2d, at 656, *supra; People v. Alicea*, 61 NY2d 23, 29; *People v. Krausz*, 84 NY2d 953).

Here, defense counsel stated that he had been "asked by * * * Harding to represent him" and that he "interviewed * * * Harding on four occasions." While defense counsel did not make clear whether Harding was a former client, a current client or [5] indeed even a client at all, confidential communications Harding may have made to defense counsel for the purpose of obtaining legal advice or services would be protected from disclosure (*see, Matter of Priest v. Hennessy*, 51 NY2d 62, 68-70; *People v. Osorio*, 75 NY2d 80, 84; *see also*, CPLR 4503[a]; Code of Professional Responsibility DR 4-101 [22 NYCRR 1200.19]). Thus, any confidential communications between Harding and defense counsel that bore on defendant's case would have created a potential conflict of interest.

Although defendant argues persuasively that the trial court should have conducted a hearing after defense counsel's somewhat cryptic comments about conversations with Harding, that omission alone does not entitle defendant to reversal of his conviction. A defendant claiming ineffective assistance of counsel must do more than show that defense counsel had a potential conflict of interest. To prevail, defendant must demonstrate that "the conduct of his defense was in fact affected by the operation of the conflict of interest," or that the conflict "operated on" counsel's representation (*People v. Alicea*, 61 NY2d, at 31, *supra; People v. Ortiz*, 76 NY2d, at 657, *supra*).

That showing was not made here. It is undisputed that Harding had no role in building the case against defendant. He did not handle any of the evidence. He was not listed as a witness—neither side even mentioned the possibility of calling him as a witness. Additionally, when the prosecutor voluntarily withdrew all fingerprint evidence, even Harding's general [6] knowledge of fingerprint processing became irrelevant.

Harding's only connection to defendant's case was that he served in the same unit as Lishansky, who found key fingerprints on the drug packaging materials seized from defendant's residence. Although there was some indication that Lishansky may have tampered with the fingerprint evidence in defendant's case, neither Lishansky nor his fingerprint evidence appeared at trial. It is uncontroverted that Lishansky was not present during the monitoring of the telephone conversations that constituted wiretap evidence in defendant's case or at defendant's home when the search warrant was executed, and that he had no contact with the seized drugs, which were removed from the packaging before it was sent for fingerprint analysis.

At bottom, it was not any potential conflict but rather Lishansky's minimal connection to the case, the withdrawal of the fingerprint evidence and the decision not to call him as a witness, that limited defense counsel's ability to fully exploit the alleged evidence tampering by the State Police. Thus, the Appellate Division correctly refused to overturn defendant's conviction on ineffective assistance of counsel grounds. Similarly, for reasons stated in the Memorandum and Order of Justice Thomas R. Mercure for the Appellate Division (_____ AD2d _____, _____), defendant's *Brady* claim is without merit.

Accordingly, the order of the Appellate Division should be affirmed.

* * * * * * * * * *

Order affirmed. Opinion by Chief Judge Kaye. Judges Bellacosa, Smith, Levine, Ciparick, and Wesley concur.

Decided December 17, 1998

Memorandum and Order of the New York Supreme Court, Appellate Division, Third Judicial Department, Dated December 18, 1997.

[1] SUPREME COURT—APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: December 18, 1997 68949

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

LEE LONGTIN,
Appellant.

Calendar Date: November 12, 1997

Before: MIKOLL, *J.P.*, MERCURE, CREW III, CASEY AND YESAWICH JR., JJ.

Connors & Vilardo LLP (Terrence M. Connors of counsel), Buffalo, for appellant.

George M. Dentes, District Attorney, Ithaca, for respondent.

Mercure, *J.*

Appeal from a judgment of the County Court of Tompkins County (Barrett, *J.*), rendered January 7, 1993, upon a verdict convicting defendant of the crimes of conspiracy in the second degree, criminal possession of a controlled substance in the first degree (two counts), criminal possession of marihuana in the second degree,

criminally using drug paraphernalia in the second degree (three counts) and criminal sale of a controlled substance in the third degree (two counts).

On two occasions during August 1991, police informant Thomas Bangerter went to defendant's home in the Town of Dryden, Tompkins County, and made controlled buys of cocaine from defendant. On September 20, 1991, County Court signed an eavesdropping warrant authorizing a wiretap on defendant's telephone, and on September 26, 1991, the police intercepted a conversation between defendant and Richard Muniz wherein defendant arranged for the purchase of 250 grams of cocaine from [2] Muniz for $7,000. The next morning, the police observed Richard Lucas and Daryl Hallock depart from defendant's home in defendant's car and further police surveillance picked them up in New York City, where they were seen with Muniz on the afternoon of September 27, 1991. Upon returning from New York City later that day, Lucas and Hallock went to defendant's residence, arriving at about 10:00 P.M. Shortly thereafter, the police executed a no-knock search warrant at defendant's residence. In defendant's upstairs bedroom, the police found four packages of cocaine with an aggregate weight of 364.7 grams (12.9 ounces) and two electronic scales, assorted plastic bags and a bottle of Inositol, a cutting agent. Elsewhere on the premises they found approximately three pounds of marihuana.

Defendant, Muniz, Hallock and Lucas were jointly indicted for two counts of conspiracy in the second degree and defendant was also individually indicted on various counts of criminal possession of a controlled substance, criminal possession of marihuana, criminal sale of a controlled substance and criminally using drug paraphernalia. At the ensuing trial, Bangerter, Lucas, Muniz's girlfriend (Maria Zabala) and a number of law

enforcement personnel testified for the People, providing considerable detail concerning the events of August and September 1991 and overwhelming evidence of defendant's participation in the criminal transactions alleged in the indictment. Convicted of conspiracy in the second degree, criminal possession of a controlled substance in the first degree (two counts), criminal possession of marihuana in the second degree, criminally using drug paraphernalia in the second degree (three counts) and criminal sale of a controlled substance in the third degree (two counts), and sentenced to prison terms aggregating 17 years to life, defendant appeals.

Substantially all of the contentions advanced on appeal are founded on a single defense theory, i.e., that the entire prosecution (and, in fact, defense) of the charges against defendant was infected by corruption. The underlying scenario, as developed through liberal application of hyperbole, innuendo and some dissimulation, features a rogue cop who manufactures damning false evidence against defendant, a corrupt prosecutor who is aware of this "ugly, little secret" but keeps silent until it is uncovered by the news media on the eve of trial (at a time when it is too late for the necessary "complete reevaluation of [defendant's] trial strategy"), and traitorous defense counsel, who is actually working for the other side. If true, defendant's account of the underlying events would compel reversal of the judgment of conviction. However, a reading of the record on [3] appeal discloses defendant's work to be largely fiction.

It is undisputed that former State Police Investigator Robert Lishansky was involved in the investigation of this case and that he falsified Hallock's fingerprint on a plastic bag containing marihuana that was seized from defendant's residence (*see, People v.*

Muniz, 215 AD2d 881, 882-883). There is also reason to believe that Lishansky may have similarly falsified defendant's fingerprint on drug packaging that was seized from defendant's residence, a fact not known by the prosecution prior to the time of trial. The Lishansky issue first arose during jury selection, on November 5, 1992, when the media reported that he had been suspended from the State Police. At that time, the District Attorney stated that he had not become aware of the seriousness of the accusations against Lishansky until the prior day, or perhaps the day before, and even then had no knowledge that Lishansky had falsified any evidence against defendant.

Nonetheless, so as to err, if at all, on the side of caution, the District Attorney stated that he would not be calling Lishansky as a witness and, in fact, was completely removing fingerprint evidence from the case. So as to alleviate defendant's concerns regarding the full extent of Lishansky's involvement in the case, the District Attorney further represented on the record that Lishansky had been assigned to the State Police Investigation Unit, not the Narcotics Unit, that he was not present during the monitoring of the telephone conversations that were to provide the wiretap evidence in the case, that he was not present when the search warrant was executed at defendant's home, and that, in fact, "his sole involvement in this case was to stay at Sidney, New York and receive packaging materials for fingerprint analysis at which time the packaging materials had already been separated from the drugs which stayed at the crime lab". Finding that there had been no *Brady* violation, County Court denied defendant's motion for a mistrial and the matter proceeded to trial.

Based upon the foregoing, we agree with the People that County Court did not abuse its discretion in denying defendant's motion for a mistrial (*see, People v. Miller,* ____ AD2d ____, ____, 658 NYS2d 482, 484, *lv granted* 90 NY2d 907; *People v. Garrette,* 223 AD2d 749, 752, *lv denied* 87 NY2d 1019). First, in view of the fact that the People were not aware of the seriousness of the accusations against Lishansky until the eve of trial, we perceive no *Brady* violation. We note in that regard that "[a] police officer's secret knowledge of his own prior illegal conduct in unrelated cases will not be imputed to the prosecution for *Brady* [4] purposes where the People had no [prior] knowledge of the corrupt officer's 'bad acts' " (*People v. Johnson,* 226 AD2d 828, 829, *lv denied* 88 NY2d 987; *see, People v. Vasquez,* 214 AD2d 93, 100-101, *lv denied* 88 NY2d 943). Second, even if there was a technical *Brady* violation, by agreeing to eliminate all fingerprint identification evidence from the case, the District Attorney in effect imposed upon himself the most appropriate sanction for the violation (*see, People v. Lussier,* 205 AD2d 910, 911, *lv denied* 83 NY2d 1005, *cert denied* 513 US 1078). Third, in the absence of any indication as to how prior knowledge of Lishansky's corruption could have assisted defendant in better preparing for trial, we perceive no prejudice. Finally, based upon the overwhelming direct evidence of defendant's guilt (*see, People v. Maldonado,* 205 AD2d 933, *lvs denied* 84 NY2d 906, 908) and Lishansky's very limited involvement in the investigation, there is no reasonable possibility that, had the evidence been disclosed to the defense, the result of the prosecution would have been different (*see, People v. Vilardi,* 76 NY2d 67, 77). Although there can be no question that defendant would have welcomed the opportunity to fully exploit the fact of Lishansky's corruption, the fact

remains that, once fingerprint evidence was removed from the case, evidence concerning Lishansky's misdeeds would have been largely irrelevant.

We are also unpersuaded by defendant's claims of conflict of interest and denial of effective assistance of counsel. Initially, in view of the removal of fingerprint evidence from the case, the fact that defense counsel was simultaneously representing State Police Investigator David Harding, a Trooper assigned to the same unit as Lishansky who was also charged with falsifying fingerprint evidence, did not constitute a conflict of interest (*see, People v. Sides,* _____ AD2d _____, _____, 661 NYS2d 863, 864). We further conclude that, viewed in the totality of the circumstances at the time of the representation, defendant's attorney provided meaningful representation (*see People v. Murphy,* 235 AD2d 933, *lv denied* 90 NY2d 896). In our view, defense counsel's inability to substantially exploit the fact of Lishansky's corruption was based not on flawed tactics but on the simple fact that, because of Lishansky's minimal connection to the case, there was very little to exploit. Similarly, the fact that defendant was convicted of a number of counts and sentenced to a severe penalty is attributable to the crimes he committed and the wealth of evidence supporting a conviction.

Defendant's remaining contentions have been considered and found to be also unavailing.

[5] Mikoll, J.P., Crew III, Casey and Yesawich Jr., JJ., concur.

ORDERED that the judgment is affirmed.

ENTER:

/s/ Michael J. Novack

Michael J. Novack
Clerk of the Court